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J.A., Appellant)	
)	
and)	Docket No. 07-32
)	Issued: May 23, 2007
U.S. POSTAL SERVICE, POST OFFICE,)	
Washington, DC, Employer)	
)	

Case Submitted on the Record

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On October 2, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated March 17 and September 13, 2006, finding a 10 percent impairment each of the right and left lower extremities for which he received a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

The issue is whether appellant has more than a 10 percent impairment of each lower extremity, for which he received a schedule award.

On May 26, 1988 appellant, then a 30-year-old city carrier, filed a traumatic injury claim. He hurt his back on May 25, 1988 as a result of being involved in an automobile accident while in the performance of duty. The Office accepted appellant's claim for lumbosacral and thoracic

strains and a herniated disc at L5-S1. It authorized lumbar disc surgery which was performed on April 9, 1990 by Dr. Harold J. Goald, an attending Board-certified neurologist.

On April 21, 1999 appellant filed a claim for a schedule award. By letter dated September 30, 1999, the Office requested that appellant submit a report from an attending physician, indicating whether he sustained any permanent impairment based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1995).

In an April 16, 1999 medical report, Dr. Rida Azer, a Board-certified orthopedic surgeon, stated that appellant experienced occasional pain in the lumbar spine region. He noted that an April 15, 1999 electromyogram (EMG) and a nerve conduction study (NCS) demonstrated left L5-S1 radiculopathy. On physical examination, Dr. Azer reported limited motion of the lumbar spine with pain and muscle spasm on movements. He opined that appellant had residuals of his May 25, 1988 employment injury which resulted in permanent limitations. Based on the A.M.A., *Guides*, Dr. Azer opined that he had a 45 percent impairment of the spine.

An October 15, 1999 report of Dr. Hampton Jackson, a Board-certified orthopedic surgeon, noted appellant's complaints of persistent lower back pain with radiation into the left iliac crest, trochanter and the left knee with intermittent radiation into the leg, but not into the foot. Dr. Jackson reviewed a history of appellant's May 25, 1988 employment injury and medical treatment. On physical examination, he reported a well-healed surgical incision and tenderness and spasm in its adjacent area. There was limited motion of the trunk, a negative pelvic compression test and positive straight leg raise on the left and right sides. Dr. Jackson indicated that appellant could not heel walk on the left side but he could do so on the right side. There was a diminished posterior tibia jerk on the left side and symmetrical ankle and knee jerks but the latter was diminished. Dr. Jackson further reported atrophy on the left leg compared to the right by one centimeter in the lower segments and one centimeter in the upper segments. He opined that appellant sustained a lumbar nerve root impairment bilaterally secondary to his May 25, 1988 employment injury. Dr. Jackson determined that involvement of the L4 root on the right side constituted a five percent maximum loss of impairment due to sensory deficit and pain in the L4 distribution (A.M.A., *Guides* 130, Table 83). He further determined that appellant had an additional 30 percent impairment of the right lower extremity due to strength deficit. Regarding the left lower extremity, Dr. Jackson found that appellant sustained a 15 percent impairment at L4, L5 and S1 due to sensory deficit and pain and a 50 percent impairment due to strength deficit. He concluded that appellant had a 35 percent impairment of the right lower extremity and a 55 percent impairment of the left lower extremity due to the accepted employment injury. Dr. Jackson further concluded that appellant sustained a 45 percent impairment of the lumbar spine and pelvis based on the A.M.A., *Guides*.

By letters dated October 11 and 14, 2002, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for a second opinion medical examination. In an October 30, 2002 report, Dr. Hanley noted a history of appellant's May 28, 1988 employment injuries and medical treatment. On physical examination, he reported that appellant was healthy and in no acute distress. Appellant sat comfortably and moved about the room easily. He got on and off the table without any assistance. Dr. Hanley stated that straight leg raising was mildly positive on both sides. Appellant's back showed a well-healed midline

scar and motion was good. Dr. Hanley indicated that he experienced some pain on return to the upright position and decreased sensation and hypersensitivity to light touch in both legs. He listed normal reflexes and strength and found no obvious weakness. Dr. Hanley diagnosed hemilaminectomy discectomy at L4-5 and L5-S1 with bilateral radiculopathy. He stated that appellant reached maximum medical improvement. Dr. Hanley opined that the physical findings indicated that appellant's accepted conditions were still active and included pain and dysesthesias in the distribution of the nerve root. He stated that appellant sustained impairment to both lower extremities. Dr. Hanley determined that the dysesthesias in both the common peroneal and superficial peroneal distribution constituted a five percent impairment for each nerve (A.M.A., *Guides* 552 (fifth edition 2001), Table 17-37). He concluded that appellant sustained 10 percent impairment to each lower extremity as a consequence of his accepted employment injuries.

On January 23, 2003 an Office medical adviser reviewed appellant's medical records. The medical adviser found that sensory loss at the L5 nerve root on the right lower extremity constituted a maximum of five percent impairment (A.M.A., *Guides* 424, Table 15-18). He further found that the sensory deficit at L5 constituted a Grade 1 impairment which resulted in 99 percent impairment (A.M.A., *Guides* 424, Table 15-15). The medical adviser determined that sensory loss at the S1 nerve root on the right lower extremity constituted a maximum of five percent impairment (A.M.A., *Guides* 424, Table 15-18). He also determined that sensory deficit at S1 constituted a Grade 1 impairment which resulted in a 99 percent impairment (A.M.A., *Guides* 424, Table 15-15). The medical adviser multiplied 99 percent for sensory deficit by a maximum impairment of 5 percent sensory deficit of the L5 nerve root to determine that appellant had a 5 percent impairment of the right lower extremity (A.M.A., *Guides* 424, Table 15-18). He also multiplied 99 percent impairment for a Grade 1 sensory deficit by a maximum of 5 percent sensory deficit of the S1 nerve root to determine that appellant had a 5 five percent impairment of the right lower extremity (A.M.A., *Guides* 424, Table 15-18). The medical adviser concluded that appellant sustained a 10 percent impairment of the right lower extremity. As appellant's condition was bilateral, he also had a 10 percent impairment of the left lower extremity.

In a January 7, 2003 report, received by the Office on January 29, 2003, Dr. Jackson stated that appellant's surgical incision was benign and minimally tender, but there was a fair amount of spasm in the lumbar paraspinal muscles. Dr. Jackson reported positive straight leg raising on the right at 45 degrees and at 60 degrees on the left. Appellant had weakness to toe walk on the right side. His heel walk was also diminished. Dr. Jackson found hypoesthesia in the distribution of S1 on the right and left sides with a significantly diminished right ankle jerk. He stated that appellant's knee jerks were symmetrical. Dr. Jackson found postlaminectomy syndrome with chronically progressive degeneration at the L5-S1 and L4-5 levels, probable significant facet arthropathy and persistent radiculopathy. He opined that appellant had failed a double-level laminectomy and considerable restriction of motion with associated pain which he related as 40 percent impairment of the whole body regarding the lower back. Dr. Jackson further opined that appellant had an additional impairment due to nerve damage in the lower extremities. He stated that he sustained a 25 percent impairment of the right lower extremity and a 10 percent impairment of the left lower extremity based on the A.M.A., *Guides*. Dr. Jackson concluded that appellant was a good surgical candidate for either a closed or open lumbar procedure and that his prognosis was poor in this regard.

By decision dated March 17, 2006, the Office granted appellant a schedule award for a 10 percent impairment of each lower extremity. On April 6, 2006 appellant requested a review of the written record by an Office hearing representative.

By decision dated September 13, 2006, an Office hearing representative affirmed the March 17, 2006 decision. The hearing representative found that Dr. Hanley's October 30, 2002 report constituted the weight of the medical opinion evidence. He properly utilized the A.M.A., *Guides* in determining that appellant had a 10 percent impairment to each lower extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.³ However, neither the Act nor the regulation specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁴

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulation.⁵ As neither the Act nor its regulation provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.⁶ The Board notes that section 8109(19) specifically excludes the back from definition of organ.⁷ However, a claimant may be entitled to a schedule award for permanent impairment to a scheduled member or organ even though the cause of the impairment originated in the neck, shoulders or spine.⁸

ANALYSIS

The Office accepted that appellant sustained lumbar and thoracic strains and a herniated disc at L4-S1 due to the May 25, 1988 employment injury. Appellant filed a claim for a schedule award on April 21, 1999 and submitted impairment evaluations dated April 16, 1999 from Dr. Azer and October 15, 1999 and January 7, 2003 from Dr. Jackson. Dr. Azer stated that

¹ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

² 20 C.F.R. § 10.404.

³ *See supra* note 1 at § 8107(c)(19).

⁴ *See supra* note 2.

⁵ *See Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

⁶ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

⁷ 5 U.S.C. § 8107; *see also Phyllis F. Cundiff*, 52 ECAB 439 (2001); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

⁸ *Id.* at § 8109(c).

appellant experienced occasional pain in the lumbar spine region and that an April 15, 1999 EMG/NCS demonstrated left L5-S1 radiculopathy. On physical examination, he reported his range of motion findings regarding appellant's lumbar spine. Dr. Azer opined that appellant had residuals of his May 25, 1988 employment injury which resulted in permanent limitations. He found that appellant sustained a 45 percent impairment of the spine based on the A.M.A., *Guides*. As noted, appellant is not entitled to a schedule award for impairment to the back under the Act unless his back injury results in impairment to a scheduled member such as the lower extremities.⁹ Dr. Azer did not provide any impairment rating for appellant's lower extremities. The Board finds that Dr. Azer's report is of diminished probative value.

Dr. Jackson's October 15, 1999 report indicated appellant's complaints of persistent lower back pain with constant radiation into the left iliac crest, trochanter and down to the left knee and the leg. He reviewed the findings of an EMG and provided his findings on physical examination of appellant's lumbar spine and lower extremities. Dr. Jackson opined that appellant sustained lumbar nerve root impairment bilaterally secondary to his May 25, 1988 employment injury. He determined that involvement of the L4 root on the right side constituted a five percent maximum loss of use due to sensory deficit and pain in the L4 distribution (A.M.A., *Guides* 130 (fourth edition 1995), Table 83). Dr. Jackson found that appellant had an additional 30 percent impairment of the right lower extremity due to strength deficit. Regarding the left lower extremity, he determined that appellant had 15 percent impairment at L4, L5 and S1 due to sensory deficit and pain (5 percent impairment for each nerve) and 50 percent impairment due to strength deficit. Dr. Jackson concluded that appellant sustained a 35 percent impairment of the right lower extremity and a 55 percent impairment of the left lower extremity as a result of the nerve damage caused by the accepted employment injury. He further concluded that appellant sustained a 45 percent impairment of the lumbar spine and pelvis based on the A.M.A., *Guides*. Although Dr. Jackson indicated that he used Table 83 on page 130 of the A.M.A., *Guides* to calculate appellant's nerve root impairment, he did not adequately explain how he applied the grading scheme in the stated table in calculating impairment due to sensory and strength deficit. The A.M.A., *Guides* provides, at page 130 in the section titled "Lumbar Nerve Root Impairment," that the percentages in Table 83 are to be multiplied by the applicable percentages in Tables 11 and 12 at pages 47-48. Dr. Jackson did not complete the calculation as specified in the A.M.A., *Guides*. He allowed appellant maximum impairment values without grading the extent of the deficit. Dr. Jackson stated that appellant had a 30 percent permanent impairment of the right lower extremity and 50 percent impairment of the left lower extremity for strength deficit based on Table 83. However, the percentages for loss of function due to strength deficit in Table 83 are 34 percent, 37 percent and 20 percent, respectively, for the L4, L5 and S1 nerves. Dr. Jackson did not explain how he arrived at his 30 and 50 percent figures for loss of function due to decreased strength. The Board finds that Dr. Jackson's determination of appellant's permanent impairment of the right and left lower extremities is not based on correct application of the A.M.A., *Guides*. As noted, appellant is not entitled to a schedule award for permanent impairment of the back.¹⁰ The Board finds that Dr. Jackson's October 15, 1999 report is of diminished probative value.

⁹ *Thomas J. Engelhart, supra* note 6.

¹⁰ *Id.*

Dr. Jackson's January 7, 2003 report provided range of motion findings regarding appellant's lumbar spine and lower extremities. He reported that appellant had weakness to toe walk on the right side and his heel walk was also diminished. Dr. Jackson indicated that there was hypoesthesia in the distribution of S1 on the right and left sides, significantly diminished right ankle jerk and symmetrical knee jerks. He diagnosed postlaminectomy syndrome with chronically progressive degeneration at the L5-S1 and L4-5 levels, probable significant facet arthropathy and persistent radiculopathy. Dr. Jackson found nerve damage in the right lower extremity with presumably diminished ankle jerk and significant hypoesthesia in the distribution of two dermatomes. Based on the A.M.A., *Guides* and on the fact that appellant had failed a double-level laminectomy and considerable restriction of motion and associated pain, he rated impairment as 40 percent impairment of the whole body. Dr. Jackson determined that appellant had an additional impairment due to nerve damage in the lower extremities. He concluded that appellant sustained a 25 percent impairment of the right lower extremity and a 10 percent impairment of the left lower extremity. As noted, a schedule award is not payable for permanent impairment of the back¹¹ or of the whole person.¹² Further, Dr. Jackson failed to provide a rationalized medical opinion on the issue of permanent impairment of appellant's right and left lower extremities. He did not identify the specific figures and tables of the A.M.A., *Guides* he utilized or explain how he determined that appellant sustained a 25 percent impairment of the right lower extremity and a 10 percent impairment of the left lower extremity.

Based on the inadequacies of the medical evidence submitted, appellant was referred for experiment by Dr. Hanley.

The October 30, 2002 report of Dr. Hanley revealed essentially normal findings on physical examination with the exception of some pain experienced by appellant on return to an upright position and decreased sensation and hypersensitivity in the distribution of the nerve root to light touch in both legs. He diagnosed hemilaminectomy discectomy at L4-5 and L5-S1 with bilateral radiculopathy. Dr. Hanley stated that appellant reached maximum medical improvement. He opined that appellant's accepted conditions were still active and included pain and dysesthesias in the distribution of the nerve roots. Dr. Hanley determined that there was dysesthesias in both the common peroneal and superficial peroneal distribution, for which a maximum five percent impairment was allowed for each nerve (A.M.A., *Guides* 552, Table 17-37). However, he did not state how he graded the sensory deficit. Dr. Hanley determined that appellant sustained 10 percent impairment in each lower extremity as a consequence of his accepted employment injuries.

The Office medical adviser reviewed Dr. Hanley's physical findings, rating impairment based on Tables 15-15 and 15-18, page 424 of the A.M.A., *Guides*. Table 15-18 provides maximum impairment for the L5 and S1 nerve roots. The medical adviser determined that a maximum of five percent impairment was allowed for the L5 and S1 nerve root (A.M.A., *Guides* 424, Table 15-18). The impairments are graded under Table 15-15 for sensory deficit. He determined that sensory nerve deficit at L5 and S1 constituted Grade 1 impairment or 99 percent impairment of the right lower extremity (A.M.A., *Guides* 424, Table 15-15). The medical

¹¹ *Id.*

¹² See Gordon G. McNeill, 42 ECAB 140, 145 (1990).

adviser multiplied 99 percent impairment for a Grade 1 sensory deficit by a maximum of 5 percent sensory deficit of the L5 nerve root and properly determined that appellant had a 5 five percent impairment of the right lower extremity. In addition, he multiplied 99 percent impairment for a Grade 1 sensory deficit by a maximum of 5 percent sensory deficit of the S1 nerve root and properly determined that appellant had a 5 five percent impairment of the right lower extremity. The medical adviser concluded that appellant had a 10 percent impairment of the right lower extremity. As appellant's condition was bilateral he also rated a 10 percent impairment of the left lower extremity.

The Office medical adviser properly applied the A.M.A., *Guides* and provided rationale for rating 10 percent impairment of the right and left lower extremities. The Board finds that the opinion of the medical adviser represents the weight of the medical evidence of record. Appellant has no more than 10 percent impairment of each lower extremity.

CONCLUSION

The Board finds that appellant has no more than a 10 percent impairment for each of his right and left lower extremities.

ORDER

IT IS HEREBY ORDERED THAT the September 13 and March 17, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 23, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board